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No. 93-1890

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CEMEX, S.A.,
Petitioner,
v.
UNITED STATES OF AMERICA,
THE AD HOC COMMITTEE OF AZ-NM-TX-FL
PRODUCERS OF GRAY PORTLAND CEMENT,
and APASCO, S.A. de C.V.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION FOR THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT

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QUESTION PRESENTED

Whether the antidumping statute authorizes the deduction of pre-sale home market transportation costs from foreign market value in the calculation of an antidumping margin.

PARTIES TO THE PROCEEDING

Respondent, The Ad Hoc Committee Of AZ-NM-TX-FL Producers Of Gray Portland Cement, makes the following amendment to the listing of corporate affiliations included in Petitioner's statement pursuant to Rule 29.1 of this Court. The Ad Hoc Committee Of AZ-NM-TX-FL Producers Of Gray Portland Cement is an informal association composed of U.S. producers of gray portland cement and cement clinker. The members of the Ad Hoc Committee and their parent companies and non-wholly owned subsidiaries, if any, are listed below:

Florida Crushed Stone Co.

Holnam, Inc. (subsidiary of Holderbank Financiere Glaris Ltd.)

Holnam Texas, L.P. (formerly BoxCrow, Inc.) (majority owned by Holnam, Inc.)

North Texas Cement Co. (joint venture of Hanson PLC and Pioneer International)

Phoenix Cement Co.

Riverside Cement Co. (joint venture of Hanson PLC and Ssangyong Cement Co.)

Southdown, Inc.

Texas Industries, Inc.

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BRIEF IN OPPOSITION FOR THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT

STATEMENT

1. In its final determination in the antidumping investigation underlying this case, the Department of Commerce, International Trade Administration ("Commerce"), deducted from foreign market value ("FMV") the Mexican respondents' expenses incurred in transporting their products from plants to distribution warehouses prior to sale to customers in Mexico. Commerce cited no provision of the antidumping statute permitting this deduction. Instead, Commerce merely stated that it "deducted

from the U.S. price inland freight which represents movement expenses from the plant to the storage facility. Therefore, to ensure an 'apples-to-apples' comparison, we have deducted movement expenses from the plant to the storage pick-up point on home market sales in our determination of FMV." Pet. App. 55a.

Commerce's deduction of transportation costs from U.S. price was required by 19 U.S.C. § 1677a(d)(2)(A), which mandates that the U.S. price "shall be adjusted by" subtracting "the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States . . . ." As conceded by all parties below, however, there is no comparable provision of the antidumping statute providing for the deduction of transportation costs from FMV.

In addition, as the government conceded below and the Federal Circuit found, Pet. App. 4a-5a, Commerce's deduction from FMV of pre-sale home market transportation expenses in the investigation below represented a change in its longstanding practice. Previously, Commerce analyzed home market transportation expenses under the provision of the antidumping statute allowing adjustments for "other differences in circumstances of sale," 19 U.S.C. § 1677b(a)(4)(B). Whether an expense is properly deductible as a circumstance of sale adjustment depends upon whether the expense is directly related to the sale at issue. 19 C.F.R. § 353.56(a)(1). Prior to the investigation below, Commerce did not treat pre-sale costs for transporting merchandise from the plant to a distribution warehouse as direct expenses deductible under the circumstance of sale provision. Those expenses were considered not directly related to a sale because no sale had yet occurred. Instead, such expenses were treated as indirect selling expenses that did not satisfy the criteria

for a circumstance of sale adjustment to FMV.[1] *See, e.g., Color Television Receivers From The Republic Of Korea,* 55 Fed. Reg. 26,225 (1990); *Antifriction Bearings (Other Than Tapered Roller Bearings) And Parts Thereof From The Federal Republic Of Germany,* 54 Fed. Reg. 19,049 (1989); *Television Receivers, Monochrome And Color, From Japan,* 53 Fed. Reg. 4052 (1988); *Portable Electric Typewriters From Japan,* 52 Fed. Reg. 1504 (1987).[2] In November 1985, in fact, Commerce advised Congress that the antidumping statute gave it no general authority to deduct pre-sale home market transportation costs from FMV.[3]

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[1] Indirect selling expenses are deductible to a limited extent, depending upon whether the fair value comparison is with purchase price or exporter's sales price ("ESP") sales. United States price is normally based on purchase price when the U.S. importer is not related to the foreign manufacturer or exporter. United States price is based on ESP when the U.S. importer is related to the foreign manufacturer or exporter. Indirect selling expenses for U.S. sales are deducted from U.S. price only in ESP comparisons, not in purchase price comparisons. Home market indirect selling expenses are deducted from FMV only when U.S. price is based on ESP, and the deduction is capped at the level of indirect selling expenses deducted from U.S. price.

[2] Petitioner erroneously asserts, Pet. 8 n.11, that this practice ended in 1987, rather than with Commerce's 1990 final determination in this case, as the government acknowledged in the courts below and as the Federal Circuit found. CEMEX's only explanation for its allegation that the practice ended three years earlier is its citation, Pet. 14-15 n.17 and 19 n.21, of the Department's 1987 decision in *Industrial Phosphoric Acid From Israel,* 52 Fed. Reg. 25,440, 25,441-42 (1987), in which the Department, contrary to its otherwise consistent practice, deducted pre-sale home market transportation costs from FMV as a direct expense. Commerce's aberrant departure from its practice on one occasion in 1987 did not signal an end to the practice. In a number of cases subsequent to 1987, including cases cited above, Commerce continued to treat pre-sale home market transportation costs as indirect expenses.

[3] In November 1985, Commerce prepared for Congress a detailed report entitled "Antidumping Adjustments Methodology And

2. Before the Court of International Trade, the government asserted no statutory basis for Commerce's deduction of pre-sale home market transportation costs. Instead, the government claimed that, because the statute did not expressly address the proper treatment of those costs, Commerce had inherent authority to fill the "gap" in the statute by making any adjustment that would result in a fair comparison between FMV and U.S. price. The Court of International Trade upheld Commerce's change in practice as a proper exercise of Commerce's authority under the antidumping law. Pet. App. 17a-21a.

3. The Federal Circuit reversed and remanded. Pet. App. 1a-12a. It noted the parties' agreement "that although the Act requires Commerce to deduct transportation costs from USP [U.S. price], there is no specific statutory authorization for Commerce to deduct home-market transportation expenses from its calculations of FMV." Pet. App. 4a. The court rejected the argument that Commerce's change in practice was justified as an exercise of "its inherent power as the administering authority to fill 'gaps' in the statutory framework." Pet. App. 5a-6a. The Federal Circuit reasoned that the statute was not silent on the issue of pre-sale home market transportation costs and, therefore, left no "gap" for Commerce to fill. "It is well established that where Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission." Pet. App. 6a, citing, *inter alia, Russello*

Recommendations For Statutory Change." That report was required by section 624 of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2248, which directed Commerce to "undertake a study of the current practices that are applied in making adjustments to FMV and U.S. price in antidumping cases." The relevant portion of this study is included in the appendix to this brief at 1a.

v. United States, 464 U.S. 16, 23 (1983). "[H]ad Congress intended to deduct home-market transportation costs from FMV, it would have made that intent clear. . . . That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV." Pet. App. 7a-8a.[4]

The Federal Circuit also observed that the antidumping statute has undergone numerous amendments, including significant amendments in 1984 and 1988, with no change in the statutory language regarding deduction of transportation costs. Pet. App. 9a. The court further noted Commerce's statement in the 1985 Antidumping Adjustments Methodology study that it lacked statutory authority to deduct pre-sale home market transportation costs from FMV. "That Congress knew of the agency's prior interpretation of the Act and, despite twice amending other Act provisions, did nothing to change the interpretation or the statutory language on which it was based is persuasive evidence that the agency's prior interpretation was the one intended by Congress." *Id.*

The Federal Circuit rejected the argument that Commerce's change in practice should be upheld because it resulted in an "apples to apples" comparison between FMV and U.S. price. Citing *Chevron USA Inc. v. NRDC*, 467 U.S. 837 (1984), the court stated that

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[4] This conclusion was bolstered by the language of the 1921 Antidumping Act, the predecessor to the current law. The FMV and U.S. price provisions of the 1921 Act were not merely parallel, but nearly identical, the exception being the failure of the FMV provision to provide for deduction of transportation expenses. Pet. App. 8a n.9. "Even given the vagaries of the legislative drafting process, it is impossible to imagine that Congress unintentionally included the same phrasing in the two passages only up to the point where the deduction for transportation costs from USP was discussed." *Id.* Consequently, "[t]he omission of the transportation cost deduction from FMV seems fully intended." *Id.*

"courts do not consider the reasonableness of an agency's interpretation of a statute unless the relevant statute is silent or ambiguous on the question at hand." Pet. App. 10a. Because the statute itself answered the question whether pre-sale home market transportation costs should be deducted from FMV, the reasonableness of Commerce's interpretation was irrelevant. *Id.* The Federal Circuit also stated that, even if the achievement of a fair comparison between U.S. price and FMV were a goal of the antidumping statute, "it is not this court's role to substitute its view of the statute's purpose for the plain language, or conspicuous lack thereof, in the statute." Pet. App. 11a.

Accordingly, the Federal Circuit reversed and remanded with directions that Commerce recalculate the dumping margins without deducting pre-sale home market transportation costs. Pet. App. 12a.

ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS

The decision below does not conflict with the decision of another court of appeals on the question presented in the petition. Indeed, such a conflict cannot arise, because the narrow issue of statutory interpretation in this case is within the exclusive jurisdiction of the Federal Circuit. The Court of International Trade has exclusive jurisdiction over civil actions commenced under 19 U.S.C. § 1516a(a)(2) to review final determinations by Commerce in antidumping investigations, 28 U.S.C. § 1581(c), and the Federal Circuit has exclusive jurisdiction to review judgments of the Court of International Trade, 28 U.S.C. § 1295(a)(5). In establishing the Court of International Trade and the Federal Circuit in 1980, Congress intended to "create[] a comprehensive system of judicial review of civil actions arising from import

transactions, utilizing the specialized expertise" of the two courts. H.R. Rep. No. 1235, 96th Cong., 2d Sess. 20 (1980). Congress thus envisioned that the Federal Circuit would have the final word over most (if not all) issues arising under the U.S. trade laws.

Petitioner suggests that the decision below conflicts with the "approach" to interpretation of the antidumping statute applied by the Federal Circuit in *Smith-Corona Group v. United States,* 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). In *Smith-Corona,* the Federal Circuit stated that, where the antidumping statute is silent on an issue, Commerce generally has the authority to resolve that issue in a manner that results in a fair comparison between FMV and U.S. price. An alleged intra-circuit conflict, however, is for the court of appeals, not this Court, to resolve. *See Wisniewski v. United States,* 353 U.S. 901, 902 (1957).[5]

In any event, there is no such conflict. The issue in *Smith-Corona*—whether Commerce's regulation providing for the deduction of indirect selling expenses from FMV in exporter's sales price comparisons up to the amount deducted from U.S. price was in accordance with the antidumping statute—is not the issue decided by the Federal Circuit in this case. Moreover, even if the Federal Circuit used different "approaches" in deciding the two cases, it fully explained the rationale for that difference in this case: "The general prescriptions of *Smith-Corona,* which serve to guide Commerce in making reasonable interpretations of the Antidumping Act, do not apply where the Act itself clearly expresses the intent of Congress." Pet.

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[5] Petitioner did not seek rehearing or rehearing in banc in the Federal Circuit on the basis of the alleged intra-circuit conflict. Petitioner did file a petition for rehearing, but solely on the ground that the case had become moot. Both the government and the Ad Hoc Committee Of AZ-NM-TX-FL Producers Of Gray Portland Cement argued that the case was still live. The Federal Circuit denied the rehearing petition without comment, and petitioner does not reassert its mootness claim in the petition.

App. 10a. Because "the antidumping statute is not silent on the question of pre-sale transportation cost deductions from FMV," Commerce had no discretion to interpret the statute other than according to its plain language. *Id.* *See, e.g., City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1594 (1994).

II. THE DECISION BELOW CORRECTLY INTERPRETS THE ANTIDUMPING STATUTE AS NOT PERMITTING THE DEDUCTION OF PRE-SALE HOME MARKET TRANSPORTATION COSTS FROM FOREIGN MARKET VALUE

The Federal Circuit's interpretation of 19 U.S.C. § 1677b is based on familiar principles of statutory construction, which demonstrate that Congress did not give Commerce authority to deduct pre-sale home market transportation expenses. Thus, the petition does not raise an important question of federal law that requires resolution by this Court.

Generally, Commerce calculates dumping margins by comparing the FMV of the merchandise to the U.S. price. FMV and U.S. price are determined by making various adjustments, set out in the statute, to the gross selling price to the customer in the foreign market and in the United States. 19 U.S.C. §§ 1677a & 1677b. There is no dispute that the statute requires Commerce to deduct from U.S. price all costs of transporting the merchandise from the foreign plant to the U.S. destination. *See* 19 U.S.C. § 1677a(d)(2)(A). There is also no dispute that the statute does not similarly provide for the deduction of transportation costs from FMV. *See* 19 U.S.C. § 1677b(a).

Given the explicit requirement that Commerce deduct transportation costs in calculating U.S. price and the lack of authorization to make a corresponding deduction from FMV, the Federal Circuit reasonably concluded that Congress did not intend transportation costs to be treated the

same in calculating U.S. price and FMV. " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello*, 464 U.S. at 23 (citation omitted). *Accord Key Tronic Corp. v. United States*, 114 S. Ct. 1960, 1967 (1994); *Rodriguez v. United States*, 480 U.S. 552, 525 (1987). If Congress had intended to authorize Commerce to adjust FMV for home market transportation costs in all instances, as petitioner claims, it would surely have done so expressly, as it did in the corresponding section governing the calculation of U.S. price. *See Russello*, 464 U.S. at 23 (citation omitted).[6]

Petitioner insists that the court below failed to give proper deference to the interpretation of the statute by Commerce, the agency charged with its administration. Pet. 22-23. At the same time, petitioner concedes—correctly—that the court's obligation to defer to an agency's construction of a statute applies only if there is no "clear direction in the statute" or if there are "textual ambiguities." *Id.* at 22. As this Court stated in *Chevron*, 467 U.S. at 843 n.9, if the reviewing "court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at is-

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[6] Contrary to petitioner's assertion, the holding below that Congress intended different treatment of transportation costs under the FMV and U.S. price provisions of the statute was not a "reflexive application" of the foregoing principle of statutory construction. In addition to the plain language of the statute, the Federal Circuit considered the consistent language of the 1921 Act, Pet. App. 8a n.9, as well as Congress' failure over many years to amend the statute to change Commerce's practice with respect to home market transportation costs. *Id. See, e.g., NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974). The lack of Congressional action was especially significant because Commerce informed Congress in the 1985 Antidumping Adjustments Methodology study that it did not have authority to deduct pre-sale transportation costs from FMV. Pet. App. 9a n.9.

sue, that intention is the law and must be given effect." *Accord. e.g., City of Chicago v. Environmental Defense Fund,* 114 S. Ct. at 1594. Here, the court below correctly ruled that the statute left no interpretational "gap" for Commerce to fill.

Petitioner also erroneously asserts that the Federal Circuit's interpretation of the FMV provision "directly contravenes the fundamental purpose of the antidumping statute." Pet. 10. Even if there were some inconsistency between the general purpose of the antidumping statute and the Federal Circuit's interpretation of the specific provision in dispute, any such inconsistency, as the Federal Circuit correctly concluded, is irrelevant. Pet. App. 10a. As this Court explained in *Rodriguez*:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

480 U.S. at 525-26 (emphasis in original).

Moreover, there is no conflict between the purpose of the antidumping law and the ruling below. Petitioner claims that the "fundamental purpose" of the antidumping law is "to ensure that the amount of the antidumping duty does not exceed the actual margin of dumping" by requiring the comparison between U.S. price and FMV to be at the same point in the chain of commerce in all instances. Pet. 12. None of the authorities cited by petitioner, Pet. 11-12, however, supports this asserted purpose.[7] Rather, the purpose of the law, as repeatedly stated

[7] The legislative history and judicial decisions cited by petitioner, Pet. 11, merely stand for the proposition that the antidumping law is a remedial statute that aims at equalizing competitive conditions between foreign exporters and U.S. producers. None of those authorities suggests—let alone holds—that the antidump-

by Congress and the courts, is to remedy and deter the dumping of foreign merchandise in the United States.[8] The Federal Circuit's decision is not inconsistent with this purpose.

Finally, there is no substance to petitioner's hyperbolic argument that the Federal Circuit's interpretation of 19 U.S.C. § 1677b does "violence . . . to the international obligations of the United States under the General Agreement on Tariffs and Trade (GATT)" and has "ramifications for the foreign policy and international economic relations of the United States." Pet. 2 and 24. Petitioner nowhere explains what "foreign policy and international economic relations" are implicated by the decision below. Rather, petitioner merely argues that Commerce's deduction from FMV of pre-sale home market transportation costs was consistent with Article 2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 26th Supp. BISD 171 (1980) ("Antidumping Code") and should have been upheld by the Federal Circuit. There are at least two problems with this argument.

First, petitioner did not raise this argument in the courts below, and those courts did not address it. Petitioner

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ing law requires identical adjustments to FMV and U.S. price in all instances, much less that such a requirement is a "fundamental purpose" of the law.

[8] *See* H.R. Rep. No. 1, 67th Cong., 1st Sess. 1 (1921) (purpose of Antidumping Act is "to prevent dumping of foreign merchandise on the markets of the United States"); S. Rep. No. 16, 67th Cong., 1st Sess. 1 (1921) (same); H.R. Rep. No. 79, 67th Cong., 1st Sess. 1 (1921) (same); S. Rep. No. 1298, 93d Cong., 2d Sess. 179 (1974) ("The Antidumping Act is designed to discourage and prevent foreign suppliers from using unfair price discrimination practices to the detriment of a United States industry."); *Melamine Chem., Inc. v. United States*, 732 F.2d 924, 933 (Fed. Cir. 1984) ("The purpose of the antidumping law, as its name implies, is to discourage the practice of selling in the United States at [less than fair value] by the imposition of appropriately increased duties.").

may not raise an argument in this Court for the first time. *See, e.g., United States v. Williams*, 112 S. Ct. 1735, 1738-39 (1992).

Second, even if the Federal Circuit's interpretation of the statute were inconsistent with the Antidumping Code, that provides no reason to question that interpretation. As noted by petitioner, Pet. 12-13, Congress passed the Trade Agreements Act of 1979 to implement the provisions of the Tokyo Round GATT Agreement, including the provisions of the Antidumping Code. *See* 19 U.S.C. §§ 2502 & 2503 (Congressional statement of purpose in enacting Trade Agreements Act and provision approving Tokyo Round trade agreements); S. Rep. No. 249, 96th Cong., 1st Sess. 36 (1979) (1979 Act was "drafted with the intent to permit U.S. practice to be consistent with the obligations of the agreements, as the United States understands those obligations"). Thus, Congress understood and intended the revised antidumping law enacted in 1979 to carry out the obligations of the United States under the Antidumping Code. Consequently, Congress believed that the disparate treatment of transportation costs in the statute was consistent with the Code.[9] There

[9] Congress anticipated the argument that provisions of the 1979 Act should be interpreted at variance with the Congressional language and intent in order to conform to the arguable requirements of the GATT. Thus, it provided in 19 U.S.C. § 2504(a) that "[n]o provision of any trade agreement . . . , nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States will be given effect under the laws of the United States." This provision was drafted to "preclude any attempt to introduce into U.S. law new meanings which are inconsistent with this or other relevant U.S. legislation and which were never intended by the Congress." S. Rep. No. 249, 96th Cong., 1st Sess. 36 (1979). "The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy." *Suramerica de Aleaciones Laminadas, S.A. v. United States*, 966 F.2d 660, 668 (Fed. Cir. 1992) (construing 19 U.S.C. § 2504(a)). Petitioner thus attempts to make the very argument that Congress anticipated and rejected.

is simply no basis for arguing that the plain language of the statute must be disregarded in favor of an alternative interpretation based on the Code.[10]

In this context, it should be noted that Congress is in the process of substantially amending the entire antidumping statute to implement U.S. obligations under the recently negotiated Uruguay Round Agreement. Amendments to the statute proposed by the Administration would moot the issue raised in the petition. Accordingly, in light of the fact that Congress and the Administration have not come to a resolution of whether to amend the antidumping law with respect to this issue, it is premature for the Court to address the issue at this time.

III. THERE IS NO MERIT TO PETITIONER'S NEWLY ASSERTED CLAIM OF A LONGSTANDING ADMINISTRATIVE PRACTICE OF DEDUCTING HOME MARKET TRANSPORTATION COSTS WITHOUT MAKING A CIRCUMSTANCE OF SALE ADJUSTMENT

Petitioner alleges that the Federal Circuit failed to consider evidence indicating that Congress did not intend to prohibit the deduction of transportation costs from FMV. Pet. 19. The only "evidence" cited by petitioner, however, is an alleged practice of the Department of the Treasury (which handled antidumping investigations prior to 1980) of deducting all home market transportation costs without regard to the statutory circumstances of sale provision. For three reasons, however, this claim does not warrant review by this Court: (1) petitioner never raised

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[10] Petitioner also claims that the decision below "will result in the imposition of excessive antidumping duties in this case." Pet. 6. Commerce has already made its decision on remand, however, and the Federal Circuit's decision only changed petitioner's dumping margin from 60.33 percent to 61.85 percent. Commerce Department's Final Results of Redetermination Pursuant to Court Remand, *Ad Hoc Committee Of AZ-NM-TX-FL Producers Of Gray Portland Cement v. United States*, Court No. 90-10-00508 (Ct. Int'l Trade May 12, 1994).

this claim in the courts below; (2) the Treasury Department never had any such practice; and (3) even if such a practice did once exist, it would have been contrary to the plain language of both the 1921 Act and the current antidumping statute, as discussed above.

This litigation has been underway since 1990. In challenging Commerce's decision to deduct pre-sale home market transportation costs, the Ad Hoc Committee relied in part on Commerce's prior practice of treating pre-sale home market transportation costs as indirect selling expenses, which were not deductible from FMV as a circumstance of sale adjustment.[11] The Federal Circuit's decision acknowledged both this practice and Commerce's 1985 Antidumping Adjustments Methodology study, in which Commerce informed Congress that it lacked authority to deduct home market transportation expenses other than pursuant to the circumstance of sale provision. Pet. App. 9a n.9.[12]

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[11] As discussed above, because pre-sale home market transportation costs were indirect selling expenses, they were deducted only in exporter's sales price comparisons, up to the amount of indirect selling expenses deducted from U.S. price. Post-sale home market transportation expenses were treated as direct selling expenses and were deducted in all instances.

[12] Although petitioner asserts that the court below "seriously mischaracterize[d]" the Commerce Department's 1985 study, Pet. 18 n.21, it is petitioner that mischaracterizes the study. For the first time in this litigation, petitioner claims that the study supports its notion that the Department has authority to deduct both pre-sale and post-sale home market transportation costs under all circumstances. The study, however, notes that, "while the deduction of U.S. product delivery costs is explicitly authorized under [19 U.S.C. § 1677a(d)(2)(A)], there is no such explicit provision for the deduction of foreign market product delivery costs." *See* appendix to this brief at 1a-2a. The study goes on to note Commerce's practice of deducting home market transportation costs only pursuant to the circumstance of sale provision. *Id.* Thus, the study concluded, as did the court below, that Commerce has no inherent authority to deduct all home market transportation costs from FMV. *Id.*

Petitioner now asserts that the Treasury and Commerce Departments in fact have had a different, longstanding practice of deducting all home market transportation costs without reference to the requirements of the circumstance of sale provision. According to petitioner, the Commerce practice cited by the court below was merely a temporary "departure" from a consistent practice otherwise followed for more than 30 years. Pet. 19 n.21. If such a practice ever existed, however, it was incumbent upon petitioner to bring it to the attention of the courts below. Having failed to do so, petitioner may not raise this claim for the first time in this Court. *See, e.g., United States v. Williams*, 112 S. Ct. at 1738-39.

In any event, no such practice ever existed. The sources cited by petitioner, Pet. 14-17, merely establish that the Treasury Department deducted home market transportation costs from FMV. None of these sources shows that the adjustment for transportation costs included pre-sale transportation costs, or that the adjustment was not made as a circumstance of sale adjustment.[13]

Petitioner has, in fact, indulged in selective citation from its own sources. Petitioner neglects to direct the

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[13] The sample price comparisons in the 1957 and 1961 Treasury Department memoranda and the 1979 General Accounting Office report cited by petitioner, Pet. 17 & Pet. App. 81a-82a, do not discuss either the rationale or the statutory authority for the described deductions of transportation costs. For example, the comparison in the 1957 Treasury Department memorandum, Pet. App. 81a, simply deducts "[t]ransportation from factory to purchaser" without further explanation. Because the example deals with direct shipment from factory to purchaser, without an intervening shipment to a distribution warehouse prior to sale, it does not demonstrate how the Treasury Department would have handled a claim for deduction of pre-sale home market transportation expenses from the factory to the warehouse. The other sources cited by petitioner similarly lack explanation and deal only with the cost of shipping from the factory directly to the customer. These are anything but the "clear explanations of administrative practice" claimed by petitioner, Pet. 17.

Court to other portions of the same sources establishing that, at least as long ago as 1966, the Treasury Department deducted home market transportation costs only pursuant to its authority to adjust for differences in circumstances of sale. For example, petitioner cites, Pet. 16-17, to a document reprinted in S.D. Metzger, *Law of International Trade: Documents and Readings* (1966). The Metzger book also reprints the Treasury Department's antidumping regulations as of 1966. A sample dumping margin calculation provided in the regulations as Example 7 (included in the appendix to this brief at 3a) clearly states that the deduction of home market transportation costs was made after "[g]iving due consideration to the circumstances of sale."

Similarly, petitioner ignores crucial information in the 1979 General Accounting Office report cited in the petition. Appendix III to that report cites examples of pricing adjustments claimed by foreign exporters in antidumping investigations under the 1921 Act. The first item on that list, under the heading, "Nature of adjustment," states: "*Circumstances of sale*—inland freight costs from manufacturer's plant to home market customers." Under the heading, "Amount approved," it is indicated that the Treasury Department approved the adjustment. U.S. General Accounting Office, *U.S. Administration Of The Antidumping Act Of 1921*, at 77 (1979) (reprinted in the appendix to this brief at 4a).[14] For these reasons,

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[14] Petitioner's claim of a consistent Treasury Department practice of deducting all home market transportation costs without making a circumstance of sale adjustment also ignores Commerce's March 1980 determination in *Portable Electric Typewriters From Japan*, 45 Fed. Reg. 18,416 (1980). Commerce had just assumed responsibility for antidumping investigations from the Treasury Department in January 1980. In that case, Commerce stated: "Silver Seiko claimed that adjustment to fair value should be made for certain costs of transporting merchandise from the factory to the distribution warehouse. This claim was disallowed, because it was not shown to be an expense directly related to the sale under consideration." *Id.* at 18,418. Thus, less than three months after

there is no basis for petitioner's claim that there was a longstanding administrative practice of deducting home market transportation costs without making a circumstance of sale adjustment.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Commerce's assumption of responsibility for antidumping investigations, Commerce rejected a claimed deduction for pre-sale home market transportation costs under the circumstance of sale provision, determining that such costs were not directly related to the sale at issue. Nothing in *Portable Electric Typewriters* suggests that Commerce's rejection of this adjustment was a departure from the Treasury Department's prior practice.

APPENDIX

APPENDIX

Excerpt from U.S. Department of Commerce Study of Antidumping Adjustments Methodology

* * * *

A. *Foreign Market Delivery and Packing Costs*

The Tariff Act of 1930 ("the statute") directs the Department to compare ex-factory prices, packed for delivery to the United States. In order to effect this comparison, we deduct any delivery costs included in United States and foreign market prices, and adjust the value of the foreign market merchandise by subtracting out foreign market packing costs and adding in U.S. packing costs. However, while the deduction of U.S. product delivery costs is explicitly authorized under section 772(d)(2)(A) of the statute, there is no such explicit provision for the deduction of foreign market product delivery costs. Similarly, while the addition of U.S. packing costs is explicitly authorized under section 773(a)(1) of the statute, there is no such explicit provision for the deduction of foreign market packing costs. Under current practice, the Department deducts foreign market delivery costs and foreign market packing costs pursuant to the implicit authority granted under section 773(a)(4)(B) of the statute to make "due allowance" for "other differences in circumstances of sale."

In *Brother Industries, Ltd. v. United States* (540 F. Supp. 1341 (CIT 1982)), the Court of International Trade upheld both practices, stating "if inland freight and/or packing costs are higher for sales made in the home market than in sales to the United States, the home market price should be adjusted downward, relative to the United States price, to reflect the differing circumstances that exist. Of course, the converse would be true if these types of costs were higher for sales to the United States."

The Department believes that fairness dictates that its current practice be continued and thus would support codification of the practice.

* * * *

Excerpt from S.D. Metzger, Law of International Trade: Documents and Readings

* * * *

Example 7. A foreign producer sells for consumption in the country of exportation at $105 a unit, delivered anywhere within the country of exportation. He has no f.o.b. factory price for home consumption. He sells to the United States f.o.b. factory for $100 a unit. Evidence indicates that it costs the producer on the average $0.50 a unit to deliver on home consumption sales.

Giving due consideration to the circumstances of sale, the sales to United States purchasers at $100 a unit will be deemed to be sales at less than fair value. Should the delivery cost on home consumption sales average $5 a unit instead of $0.50, the sales to United States purchasers at $100 a unit will not be deemed to be sales at less than fair value.

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Excerpt from 1979 General Accounting Office Report

APPENDIX III

EXAMPLES OF PRICING ADJUSTMENTS SUBMITTED BY MANUFACTURERS FOR MERCHANDISE SUBJECT TO FINDING OF DUMPING

Commodity/ Country	Nature of adjustment	Amount requested	Amount approved	Time required to respond (note a)
Japan:				
Roller chain	*Circumstances of sale*—inland freight costs from manufacturer's plant to home market customers.	Varied from 15 yen to 635 yen depending on destination	Approved actual amount claimed for deliveries to each customer.	8½ months
Roller chain	*Circumstances of sale*—interest expense—home market sales are usually paid by promissory note. Export sales generally require immediate cash payment.	1.76 percent for 1st year of sales.	1.76 percent	8½ months
		2.91 percent for 2nd year of sales.	2.91 percent	8½ months
Roller chain	*Circumstances of sale*—expenses of sales activities—cost of salesmen's salaries, retirement allowances, travel, entertainment, etc.	1.59 percent for 1st year of sales.	Claim disallowed for both years. Manufacturer did not satisfactorily demonstrate that these expenses were directly related to sales in question.	8½ months
		1.51 percent for 2nd year of sales.		8½ months
Roller chain	*Circumstances of sale*—advertising expenses incurred for home market sales.	.35 percent for 1st year of sales.	Disallowed because of failure to demonstrate direct relationship to sales.	8½ months
		.11 percent for 2nd year of sales.		8½ months
Roller chain	*Circumstances of sale*—warehouse expense—home market sales are distributed from a warehouse whereas export sales are distributed from the plant.	Varied from 0 to 945 yen, depending upon size of chain involved.	Disallowed because of failure to demonstrate direct relationship to sales.	8½ months
Roller chain	*Circumstances of sale*—warranty expense—home market sales are given a 1-year warranty whereas export sales contain no warranty.	.29 percent for 1st year of sales.	.28 percent	8½ months
		.21 percent for 2nd year of sales.	.0793 percent	8½ months
Roller chain	*Circumstances of sale*—cost for packaging material and labor for export sales.	Amount claimed varied for each of 53 types of roller chains.	Approved	8½ months
Roller chain	*Similar merchandise*—Additional manufacturing costs to cut chains for export to specified lengths.	1572 yen for 1st year of sales.	Considered irrelevant because sufficient sales of cut chain existed in home market to make valid comparison of prices.	8½ months
		1948 yen for 2nd year of sales.		8½ months